CHAPTER FIVE

TRUTH IN ELECTORAL ADVERTISING

Introduction

5.1 This chapter considers the Electoral Amendment (Political Honesty) Bill 2000 [2002] introduced by Senator Murray. The Bill is the most recent of several attempts by the Australian Democrats over the last decade to introduce legislation to promote truth in electoral advertising. It was introduced as companion legislation to the Charter of Political Honesty Bill.

5.2 This chapter briefly describes the main provisions in the Bill and then looks at the following matters:

- current regulation of federal electoral advertising;
- previous consideration of truth in electoral advertising;
- evidence to this inquiry; and
- other issues—the definition of material to be prohibited under the Bill, reversal of onus of proof, appropriateness of penalties, orders to publish and headings to electoral advertisements.

5.3 The Bill proposes amendments to the *Commonwealth Electoral Act 1918* (the Electoral Act) to prohibit the printing, publication or distribution of any electoral advertisement containing a statement, purporting to be a statement of fact, that is 'inaccurate or misleading to a material extent'. Penalties of $5,000 for individuals and $50,000 for bodies corporate are to apply to contraventions of this provision. The Bill also applies these penalties for the existing offence in the Electoral Act of misleading a voter in the act of voting (discussed below at paragraph 5.8). The new penalties represent a significant increase over the current penalties for that offence.[1]

5.4 The Bill provides that it is a defence to prosecution if the person can prove that he or she took no part in determining the content of the advertisement, and could not reasonably be expected to have known that the content was inaccurate or misleading or likely to mislead a voter in casting a vote.

5.5 The Electoral Commissioner is given added powers under the Bill. If the Commissioner is satisfied an advertisement is inaccurate or misleading to a material extent, he or she can request the advertiser to withdraw it from further publication and/or to publish a retraction in specified terms and format. The Bill provides that the advertiser's response to such a request is to be taken into account in assessing any penalty for which the advertiser is liable if prosecuted. The Electoral Commissioner may also apply to the Federal Court for an order that the advertiser withdraw the advertisement and/or publish a retraction.

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1 Sections 329(1) and (4) of the *Commonwealth Electoral Act 1918,* (compilation prepared on 6 November 2001) which prohibits the publication of material that would be likely to mislead or deceive voters in relation to casting their votes, currently attracts penalties of $1,000 or imprisonment for a period not exceeding 6 months, or both for individuals and $5,000 for bodies corporate.

5.6 The Bill also specifies requirements for the publication of electoral matter in newspapers where payment is or will be made. The newspaper proprietor must print the word 'advertisement' as a headline above each article or paragraph containing electoral matter in letters not smaller than 10 point. The penalties for failure to meet those requirements are $1,000 for an individual and $5,000 for a body corporate.[2]

Current regulation of federal electoral advertising

5.7 There is currently only limited regulation of electoral advertising under the Electoral Act.[3] Apart from setting out certain requirements as to the publication of details of the person who authorises an advertisement and prohibiting the publication of any false and defamatory statement about a candidate's personal character and conduct,[4] the Act prohibits the misleading of voters only in the act of casting their votes.[5] Section 329(1) of the Act states that:

> A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.

5.8 The High Court has determined that the words 'in or in relation to the casting of a vote' refer to 'the act of recording or expressing the elector's political judgment' rather than to the formation of that judgment.[6] Thus the section only prohibits advertising that misleads voters in the procedural aspects of voting, such as filling out their voting forms and depositing them in the ballot box.

Previous consideration of truth in electoral advertising

5.9 Over the last two decades, the effectiveness of the law in dealing with misleading advertising in the lead up to elections has been considered by parliamentary committees at both Commonwealth and State level. Relevant legislation was briefly in place in 1984 for federal elections and is currently in place in South Australia.

5.10 This section briefly outlines those developments in order to provide a background for consideration of the provisions of the current Bill. The section considers:

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2 Clause 329(A).

3 There is also limited regulation of the broadcast of electoral advertisements under the *Broadcasting Services Act 1992* (Schedule 2), including the imposition of a 'blackout period' for two days prior to an election, a requirement for broadcasters who broadcast election matter to give reasonable opportunities to all political parties and a requirement that broadcasters keep identifying particulars of the authorisation of the broadcast of political matters. However, none of those requirements are concerned with the accuracy or otherwise of such matter.

4 Section 350(1). The penalty for an offence is $1,000 and/or imprisonment for six months for an individual and $5,000 for a body corporate. Aggrieved candidates have a right under section 350(2) to seek an injunction restraining repetition of the statement or any similar false and defamatory statement.

5 There are similar provisions in most Australian States and Territories, such as the *Parliamentary Electorates and Elections Act 1912* (NSW) s. 151A, the *Electoral Act 1992* (Qld) s. 163(1) and the *Electoral Act 1985* (Tas) s. 209.

6 *Evans v Crichton-Browne* (1981) 147 CLR 169. The Australian Electoral Commission (AEC) submission no. 14, provides a detailed explanation of the court's findings, attachments 1, p. [2 and 4], attachment 7, p. [1].

- previous amendments to the Electoral Act in 1984;
- subsequent Commonwealth parliamentary inquiries;
- the Trade Practices Act model;
- constitutional constraints on the regulation of political advertising; and
- the South Australian legislation.

Previous amendments to the Electoral Act

5.11 In 1983 the Commonwealth Parliament appointed a Joint Select Committee on Electoral Reform (JSCER) to inquire into all aspects of the conduct of federal elections. While the JSCER's first report in 1983 only briefly touched on political advertising, the Parliament in implementing recommendations from that report also amended the Electoral Act to prohibit 'untrue' electoral advertising. The amendment that came into force in early 1984 provided that:

> A person shall not, during the relevant period in relation to an election under this Act, print, publish, or distribute, or cause, permit or authorize to be printed, published or distributed, any electoral advertisement containing a statement—
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> (a) that is untrue; and
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> (b) that is, or is likely to be, misleading or deceptive.[7]

5.12 However, the subsection was repealed in October, the same year after the JSCER's second report found it to be fundamentally flawed on several grounds:

- Publishers might need to seek legal advice prior to publication in order to ensure that they were not exposed to prosecution. This could create undesirably long lead times when political parties were seeking to respond to particular issues.[8]
- A determination as to whether a political statement is 'true' 'seems necessarily to involve a political judgement, based upon political premises', and it was undesirable 'to require the courts to enter the political arena in this way'.[9]
- Political advertising should be distinguished from other types of advertising on the basis that 'it promotes intangibles, ideas, policies and images'.[10] It was not possible to control political advertising through legislation.[11]

5.13 The JSCER concluded that the provision was unworkable and that 'any amendments to it would either be ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising'.[12] The provision was subsequently repealed.

5.14 However, in a dissenting report Australian Democrat Senator Macklin, while acknowledging that some amendment to the existing provision was needed to protect

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7 AEC, submission no. 14, attachment 1, p. [5].

8 Joint Select Committee on Electoral Reform, *Second Report*, 1984, p. 26, para 2.41.

9 ibid, para 2.62.

10 ibid, para 2.79.

11 ibid, para 2.81.

12 ibid, para 2.81.

publishers, maintained that there were good reasons to retain legislative controls on electoral advertising. Senator Macklin argued that there was no evidence to support the assertion that fact was less distinguishable in the political arena than elsewhere, and that courts dealt daily with matters that concerned expressions of opinion rather than fact. In 1990 Senator Macklin introduced a Bill to reinstate a similar provision in the Electoral Act, but it was not successful.[13]

5.15 In agreeing with the findings of the 1984 report of the JSCER that subsection 329(2) was unsatisfactory, Senator Walsh, Minister for Resources and Energy, told the Senate:

> The Government shares the Committee's view that, while fair advertising of political parties' election promises, and of their rivals' counter-arguments, is a desirable objective, it is not one that can be obtained through legislation. Political advertising quite often needs to deal with the abstract and, for that reason, it assumes a different form from that of other advertising on radio, on television, and in the newspapers.
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> Sub-section 329(2) of the Commonwealth Electoral Act, as it stands, prohibits untrue, misleading or deceptive political advertising. Those honourable senators who have witnessed the realities of past elections will know that the provision is unworkable.
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> The Government accepts the conclusion of the Joint Select Committee that any amendment would either still be ineffective or would reduce its scope to such a degree that it would not prevent dishonest advertising.
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> … In the final analysis, if deemed necessary, the law of defamation provides an avenue for those concerned enough or having good reason, to pursue the issues in the courts.[14]

Subsequent Commonwealth parliamentary inquiries

5.16 In 1994, the subsequent Joint Standing Committee on Electoral Matters (JSCEM) inquired into the conduct of the 1993 federal election. The majority report concluded that the Committee had heard no evidence to persuade it that 'truth in political advertising' legislation would be more workable than when the former provision was repealed in 1984.[15] However, a dissenting report by non-government committee members recommended the reinstatement of the former provision.[16] A separate dissenting report by Australian Democrat Senator Meg Lees contended that some political advertising was 'clearly dishonest' and had 'no basis in fact', and that the perceived problems in achieving 'truth' in political advertising had been over-emphasised.[17]

5.17 In 1995 the Australian Democrats moved an amendment to the Electoral and Referendum Amendment Bill 1995 to reintroduce a 'truth in advertising' provision that was

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13 Commonwealth Electoral (Printing, Publishing and Distribution of Electoral Matter) Amendment Bill 1990.

14 Senator Walsh, Senate *Hansard*, 8 October 1984, p. 1410.

15 JSCEM, *The 1993 Federal Election: Report of the Inquiry into the Conduct of the 1993 Federal Election and Matters Related Thereto,* November 1994, para 8.1.5.

16 ibid, p. 164.

17 Senator Lees referred to examples of advertisements asserting that a parliamentarian had voted for a particular measure when the public record proved otherwise: ibid, p. 169.

very similar to the repealed provision. Although the amendment was passed by the Senate, it was rejected by the House of Representatives and the Bill lapsed when Parliament was dissolved in 1996.[18]

5.18 In 1997 the JSCEM's inquiry into the conduct of the 1996 federal election considered the issues again. While finding that the repealed provision was not appropriate because of the shortcomings that had been previously identified,[19] the JSCEM supported the introduction of legislation to prohibit 'misleading statements of fact', stating:

> While it is not feasible to regulate assertions about the impact of a party's policies, this does not excuse deliberate misrepresentations of what a candidate's or party's stated policies actually are, or other distortions of straightforward matters of fact. If some of the misleading statements made during elections were instead made in private enterprise, the perpetrators would most likely find themselves prosecuted under the Trade Practices Act. There is no valid reason for not applying similar principles to the factual content of election advertising.[20]

5.19 The Government response to the JSCEM's report, however, rejected the recommendation. While confirming its commitment to truthfulness in political advertising, the Government stated that legislation would be too 'difficult to enforce and could be open to challenge'. It therefore emphasised the primacy of the ballot box as the final and most effective regulator of the content of pre-election advertising.[21]

5.20 In its subsequent report on the 1998 federal election, the JSCEM noted that concerns had again been raised about the issue of truth in electoral advertising, but made no recommendation.[22] In a dissenting report, Australian Democrat Senators Bartlett and Murray argued that the Electoral Act should be amended to prohibit inaccurate or misleading statements of fact which are likely to deceive or mislead.[23] The Government response, however, noted that it was 'not convinced that this proposal could be satisfactorily implemented'.[24]

The Trade Practices Act model

5.21 As noted above, the 1997 JSCEM report considered that the approach taken in the trade practices legislation was appropriate to regulate political advertising. This is similar to the approach of the current Bill, whose intent was described by Senator Murray as

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18 See Australian Electoral Commission, submission no. 14, attachment 5, p. [2].

19 JSCEM, *The 1996 Federal Election: Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, June 1997, para 7.9. The Committee also noted that the cases on the implied constitutional freedom of political discussion added to the limitations that had been identified in 1984.

20 ibid, para 7.10 and Recommendation 47.

21 Government Response, Senate *Hansard*, 8 April 1998, p. 1664.

22 JSCEM, *The 1998 Federal Election: Report of the inquiry into the conduct of the 1998 federal election and matters related thereto,* June 2000*,* pp. 42-43.

23 ibid, pp. 167-168.

24 *Government Response to the Joint Standing Committee on Electoral Matters (JSCEM) Report 'The 1998 Federal Election',* p. 23.

'requir[ing] political advertising to meet similar standards of probity and honesty as commercial advertising must meet under the Trade Practices Act.'[25]

5.22 Under the Trade Practices Act, advertising, like other conduct in trade and commerce, can be challenged if it is misleading or deceptive, or likely to mislead or deceive.[26] Whether particular conduct is misleading or deceptive is a question of fact to be determined in light of the surrounding circumstances. The intention of the advertiser (that is, whether he or she intended to mislead the public) is irrelevant.

5.23 In considering advertising cases, the courts have allowed for the fact that the nature of advertising is to place the product or service in a favourable light. Essentially, what must be considered is the sense in which the ordinary reasonable reader would understand the advertisement. 'Puffs', that is, obvious exaggerations which are unlikely to mislead anyone, are not caught by the legislation.[27]

5.24 In 1996, the Queensland Parliament's Legal, Constitutional and Administrative Review Committee examined the issue of truth in political advertising in some detail and made some key findings on the applicability of the trade practices legislation.[28] The Committee concluded that there was 'insufficient difference' between political and commercial advertising to rule out legislation in the political sphere.[29] In particular, the Committee found:

- the argument that the electorate is the most appropriate body to determine the truth of political claims was undermined by the fact that it was once also claimed that the market would operate to allow consumers to ascertain the truth about products; and
- the assertion that political statements promote intangibles, ideas and policies which cannot be regulated by legislation was countered with evidence that the trade practices legislation has been successfully interpreted to regulate vague and complex subject matter.[30]

5.25 The committee's conclusions were not unanimous, however. Three of the six committee members issued a dissenting statement to the report, opposing the introduction of legislation on truth in political advertising on the grounds that it would be unworkable and open to abuse for political purposes.[31]

5.26 The committee's recommendations in support of legislation for truth in political advertising have not been implemented.[32] A more recent report in 2000 by the subsequent

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25 Senator Murray, Charter of Political Honesty Bill 2000 and Electoral Amendment (Political Honesty) Bill 2000, Second Reading Speech, Senate *Hansard,* 10 October 2000, p. 18198.

26 Section 52. There are complementary provisions in State fair trading legislation to deal with conduct that occurs wholly within a State's borders.

27 *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 53 FLR 307.

28 Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee *Report on Truth in Political Advertising*, Report No 4, December 1996.

29 ibid, p. 28.

30 ibid, pp. 20-22.

31 ibid, pp. 58-62.

32 A Private Member's Bill on this matter was introduced in 1999.

Queensland Legal, Constitutional and Administrative Review Committee has concluded that formulating an effective and appropriate law 'appears difficult' in practice.[33]

Constitutional constraints on the regulation of political advertising

5.27 The 1996 Queensland parliamentary committee report noted that political advertising differed from commercial advertising in one key respect. Freedom of political communication is protected by the Constitution, as enunciated by the High Court in a series of landmark decisions in the 1990s, whereas commercial advertising is not.[34]

5.28 However, the freedom of political discussion is not absolute. A law that restricts that freedom may still be valid if it is appropriate and adapted to serve a legitimate interest that is compatible with the system of government.[35] The Queensland parliamentary committee report concluded that legislation preventing misleading and inaccurate statements of fact in political advertising 'would be an acceptable and proportional intrusion' on freedom of speech.[36] Regulation of expression of opinion or prediction, on the other hand, would be inappropriate.

5.29 The High Court has not had the opportunity to consider whether such legislation is valid, although this issue has been considered by the South Australian Supreme Court (as is discussed below).

The South Australian model

5.30 South Australia is the only Australian jurisdiction that has legislation governing truth in political advertising. The laws are similar, but not identical, to those in the Bill under consideration.

5.31 Section 113 of the South Australian *Electoral Act 1985* provides that it is an offence for a person to authorise, cause or permit the publication of an electoral advertisement which contains a statement purporting to be statement of fact, but which is inaccurate and misleading to a material extent.[37] Thus the South Australian provision is narrower than the repealed Commonwealth provision because the South Australian provision is limited to statements of fact, rather than any statements (including expressions of opinion) which are 'untrue'. The South Australian provision also differs from the current Bill in that it prohibits statements of fact which are both inaccurate and misleading, whereas the Bill seeks to prohibit statements of fact which are either inaccurate or misleading. The implications of this difference are discussed further at paragraphs 5.86 – 5.88.

5.32 The South Australian legislation includes a statutory defence which is very similar to that in the current Bill, in that the defendant must prove that he or she took no part in

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33 Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee *The Electoral Amendment Bill 1999*, April 2000, p. 14.

34 The provisions of the *Political Broadcasts and Political Disclosures Act 1991* (Cwlth), which banned the broadcast of political advertising on radio and television during an election period, were held to be invalid as they were contrary to that implied freedom: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 ALR 577. See also *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681.

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

36 Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee *Report on Truth in Political Advertising*, December 1996, p. 29.

37 Penalties of $1,000 for an individual and $10,000 for a body corporate apply.

determining the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading.

5.33 The South Australian Act also contains provisions that allow the Electoral Commissioner to request an advertiser to withdraw an advertisement and/or to publish a retraction, and to apply to the Supreme Court for an order to that effect. With the exception of a reference to the Federal Court instead of the Supreme Court, the provisions of the current Bill are identical.

5.34 The South Australian Supreme Court has considered whether section 113 infringed the implied right to freedom of political discussion. In *Cameron v Becker*,[38] the Full Court of the Supreme Court upheld a conviction relating to an advertisement run during the 1993 State election campaign.[39] The court noted that the limitation imposed by section 113 on freedom of political discussion was proportionate to the legitimate object of ensuring that factual material in electoral advertisements was accurate and not misleading.[40] Consequently section 113 was found to be valid.

Evidence to this inquiry

5.35 This section first considers the threshold issues of:

- whether greater control over electoral and political advertising is necessary; and
- if so, whether legislation is the best means to achieve that end.

5.36 The section then considers evidence on:

- whether enforcement through the courts is appropriate; and
- whether the role proposed for the Australian Electoral Commission is appropriate.

5.37 More detailed aspects of the Bill are considered in the following section.

Is greater control of electoral and political advertising necessary?

5.38 Senator Murray submitted that political advertising needed to be better controlled because:

> … elections are one of the key accountability mechanisms in our system of government. Advertisements disseminated during an election campaign must be

38 (1995) 64 SASR 238.

39 The conviction related to an ALP television advertisement that stated, 'The fact is that the Brown Liberals have stated that any school with less than three hundred students will be subject to closure'. A Liberal Party spokesman in a prior radio interview had said '…we've indicated…that we're certainly not going to be closing two hundred schools in South Australia. If there are a small number of schools that have got a very small number of students, well then under both Governments I guess there will continue to be a small program of school closures, but we're not going to be looking at schools with three hundred students in them.' The court found that the advertisement was inaccurate and misleading.

40 Per Olsson J at para 46, Bollen J agreeing. Lander J expressed similar views, noting that the legislation protects an elector's 'fundamental right' to be widely informed and not to be led by deceit or misrepresentation into voting differently (para 30).

> legally required to represent the truth. Advertisements purporting to represent 'facts' must be legally required to do so accurately.
>
> Greater controls over political advertising will also help stem the public perception that politicians are not trustworthy. This perception is one of the most serious threats to the legitimacy and integrity of Australian democracy.[41]

5.39 A submission from the Key Centre for Ethics, Law, Justice and Governance at Griffith University (KCELJAG) elaborated on the fears that lie behind the support for better regulation of electoral advertising:

> False or misleading electoral advertisements, timed during the crucial 4 or 5 weeks of an election campaign, may persuade voters to vote in ways they otherwise would not and which they are likely to regret if and when they discover the true facts…Such strategies threaten the integrity of the heart of the democratic process—voters are not choosing between the policies on offer but between misrepresentations of those policies. It also threatens trust in government by the electorate.[42]

5.40 The KCELJAG noted, however, that 'the difficulty of distinguishing legitimate from illegitimate ways of campaigning or advertising, combined with the public's undisputed interest in hearing each political party's own presentation of its case' had led to a lack of support for regulation, stating:

> It might be argued that any solution is worse than the problem itself. It might be argued that the advantages gained by misleading advertising in a vigorous democracy in a skeptical media are limited and more or less evenly balanced.[43]

5.41 However, the KCELJAG submission argued that it was both 'legally possible and politically feasible' to introduce an integrated ethics regime to raise standards both in electoral advertising and government advertising.

Is legislation the best approach?

5.42 Opinions were divided on whether legislation was the appropriate vehicle for seeking to regulate electoral advertising. Senator Murray told the Committee that legislation should provide penalties for failing to represent the truth in political advertisements:

> The enforcement of such legislation would advance political standards, promote fairness, improve accountability and restore trust in politicians and the political system.[44]

5.43 He argued that other models had been shown to be successful:

> [The Trade Practices Act] was enacted despite the protestations of ardent critics that legislating for honesty is stifling and unworkable. We now have vastly better standards of commercial advertising because the Government of the day was prepared to push ahead with its reform agenda.

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41 Submission no. 13, p. 3.

42 Submission no. 22, p. 3.

43 Submission no. 22, p. 3.

44 Submission no. 13, p. 3.

> This Bill will no doubt encounter the same sort of criticism, but the success of the Trade Practices Act in the private sector and the success of the South Australian law in the political arena must surely put to rest any remaining doubt about the effectiveness and feasibility of legislating for honesty.[45]

5.44 Some submissions, including those from Dr John Uhr[46] and Mr Eric Lockett,[47] supported the Bill. Dr Uhr argued:

> Many potential reformers doubt that much can be done to regulate misleading or deceptive campaigning. There is a conventional assumption that all forms of political speech are in a special zone beyond the reach of ordinary regulation. I disagree and can point to emerging new models of appropriate regulation. One precedent is the 1998 Howard government legislation called the *Charter of Budget Honesty Act*…[48]

5.45 While pointing to the South Australian law as an example of such provisions, Dr Uhr noted that he had no knowledge of their practical operation and suggested that expert advice should be sought on their effectiveness.[49]

5.46 Not all submissions agreed that legislation was the appropriate mechanism. Dr Gerard Carney, Associate Professor of Law at Bond University, said:

> … statutory requirements of this nature seem to be incapable of being fairly enforced. Not only are there practical difficulties in determining both the *truth* and *misleading* nature of such political advertising, but there seems to be no feasible mechanism to ensure effective compliance with those standards during an election campaign.[50]

5.47 The Australian Electoral Commission (AEC) stated that it had consistently opposed the regulation of 'truth' in political advertising on the basis that:

> … it is the right and responsibility of voters, with the assistance of a vigilant media, to make their own judgements about such matters.[51]

5.48 The AEC referred to its submission to the 1993 JSCEM inquiry, where it detailed its reasons for opposing such legislation:

> … the imponderables in a volatile political environment pre-election, the difficulty of assessing 'policy' statements, and the risks of manipulation/mischief/misuse…[52]

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45 Submission no. 13, pp. 5-6.

46 Submission no. 16, p. 4

47 Submission no. 12, p. 4.

48 Submission no. 16, attachment 2, p. 18. The *Charter of Budget Honesty Act 1988* states that its purpose is to improve fiscal policy outcomes by requiring fiscal strategy to be based on principles of sound fiscal management and by facilitating public scrutiny of fiscal policy and performance. The Charter provides for such measures as fiscal strategy statements, regular fiscal reports and pre-election fiscal and economic outlook reports.

49 Submission no. 16, p. 4.

50 Submission no. 11, p. 1.

51 Submission no. 14, p. 2. This statement repeats the AEC's submission to the JSCEM inquiry in 1996 (see attachment 4, para 2.10).

52 Submission no. 14, attachment 4, para 2.4.

5.49 The AEC noted, however, that if legislation were to be introduced, the South Australian model which is confined to statements of fact should be given closer consideration rather than the broader scope of the former Commonwealth provisions.[53]

Enforcement through the courts

5.50 The basic premise of the Bill is that it is necessary to give the courts power to regulate misleading electoral advertising by creating a criminal offence and giving the courts power to order retraction and/or correction of offending advertisements.

5.51 The Australian Broadcasting Authority (ABA) argued that regard should be had to existing self-regulatory arrangements which address the nature and content of advertising. These included codes of practice for broadcasters (such as the Federation of Commercial Television Stations' Code of Practice) and the code of ethics for the advertising industry adopted by the Australian Association of National Advertisers.[54]

5.52 However, in his submission Senator Murray said the Bill proposed enforcement through the courts because self-regulation had proven ineffective. He stated:

> Experience teaches that when the competitive interests of political parties are at stake, only force of law will ensure that reasonable standards on truthfulness are upheld.[55]

5.53 During this inquiry the Committee sought views on whether enforcement through the court process would be effective in regulating electoral advertising. The Clerk of the Senate noted that, in principle, there appeared to be no difficulty with the Bill in that the courts are accustomed to determining whether a statement was a statement of fact or if material was misleading or deceptive to a material extent. He submitted that such determinations were 'reasonably free of subjective elements'.[56]

5.54 The KCELJAG submission, however, took a different view:

> The problem is that most statements which voters consider 'lies' are not really misrepresentations of fact but of future intention…(V)oters are entitled to satisfy themselves that a candidate really has no intention of carrying out a promise he or she is making; for courts to make such a judgement is too subjective.[57]

5.55 Another concern was whether the system could respond in a timely way to issues as they arose during an electoral campaign. It was acknowledged that the Federal Court would probably be restrained in ordering the withdrawal of advertisements because of their traditional reluctance to issue injunctions restraining freedom of speech.[58] In response to questioning by the Committee, the Clerk of the Senate also noted that because offences take some considerable time to prosecute:

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53 Submission no. 14, p.2.

54 Submission no. 20, p. 2. Article 7 of the Code states that advertisements shall not be misleading or deceptive, or likely to mislead or deceive.

55 Submission no. 13, p. 6.

56 Submission no. 4, p. 2.

57 Submission no. 22, pp. 12-13.

58 Harry Evans, *Committee Hansard*, pp. 8-9.

> You could not correct [the mischief] during the course of the campaign…It would only be useful for future campaigns, not the current one.[59]

5.56 He commented that it was necessary to be clear whether the aim of the Bill was to stop particular instances of conduct during a campaign, or to build up a body of law which would apply in the future and presumably act as a deterrent to future misconduct.

5.57 The KCELJAG also pointed to difficulties in enforcing offence provisions because of the time lag:

> …an allegation [that a candidate has no intention of carrying out a promise] can only be proved or disproved after time has passed—after the candidate has been elected and has either kept or broken his or her promise. Thus it may take a full parliamentary term (or several) to verify the allegation: if and once it's proved, the remedy is a political one (electoral defeat). By contrast, if a ban on 'inaccurate or misleading' statements is to have any value, it must be enforced *legally*, and enforced *immediately* (i.e. during the heat of the campaign). It is no use the High Court or Electoral Commissioner handing down a ruling six months after the polls have closed saying '*Well, actually the Opposition should really have won because the Government was lying…*'[60]

5.58 The KCELJAG submission argued that efforts needed to be directed at providing advice before advertising takes place. The submission proposed an alternative model to enforcement by the courts: the establishment of a committee to provide clearance of a political advertisement prior to its publication, with a separate committee being established to consider any objections after the event. The appropriate standards to be met should be developed by a bi-partisan group of parliamentarians. While obtaining pre-clearance would be a voluntary process, the KCELJAG argued:

> … the views of an independent, credible committee would be a serious blow to the advertisement's credibility…The sanction for not doing so [seeking pre-clearance] and being in breach of standards of veracity would not be legal, formal and imposed months after the election campaign. The sanctions would be political and immediate.[61]

The South Australian experience

5.59 Given that legislation similar to that proposed in the Bill has been in place in South Australia for some considerable time, the Committee was interested to hear about the experience in that State.

5.60 The former South Australian Electoral Commissioner, Mr Andrew Becker, who is now the Australian Electoral Commissioner, noted that there had been two prosecutions under the Act. He stated that he did not believe the South Australian legislation had had any appreciable effect on the nature of electoral advertising in the State. Instead, he considered that the legislation opened up opportunities for individual candidates to disrupt the electoral process by lodging nuisance complaints. Mr Becker referred to a particular instance where he

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59 *Committee Hansard*, p. 8.

60 Submission no. 22, pp. 12-13.

61 Submission no. 22, p. 10.

had pursued a complaint against a candidate, who then proceeded to lodge complaints about other advertisements and 'just fired off three or four a day'.[62]

5.61 A submission from the current South Australian Electoral Commissioner, Mr Stephen Tully, did not comment directly on the Bill as he considered that to be a matter of government policy. However, he welcomed measures that reinforce the probity of the electoral and political systems.[63]

The proposed role of the Australian Electoral Commissioner

5.62 The Bill proposes to give the Australian Electoral Commissioner new responsibilities in the regulation of electoral advertising. It confers the task of evaluating campaigns for misleading or inaccurate content on the Commissioner, who may request withdrawal and in the case of non-compliers, refer the matter to the Federal Court. This approach closely follows the South Australian legislation.

5.63 The AEC's submission noted that it had consistently opposed the proposal that the AEC should become responsible for administering the legislation and investigating and receiving complaints.[64] It was particularly concerned that its independent position would be politically compromised by its proposed role. In its submission to the 1996 JSCEM inquiry, the AEC had argued that:

> In deciding on whether to apply for an injunction in particular cases, the AEC would be placed in the very difficult position of assessing the truth (or factual) content of party political campaign advertising and gathering sufficient supporting evidence to convince a court, a task well beyond its present responsibilities, and would be obliged to initiate court proceedings that would undoubtedly provoke serious and possibly damaging criticism of the AEC from one or other side of politics.[65]

5.64 During the public hearing for this inquiry, the Australian Electoral Commissioner, Mr Becker, elaborated on this view:

> … it could drag the AEC into a political bunfight in the determination of whether the veracity of the statements and so on is correct. There is a lot of subjectivity in this sort of thing…[66]

5.65 The AEC also considered that the process of obtaining an injunction would allow opposing political parties to disrupt the election process.

5.66 Another worry was the impact on the AEC's resources. The Deputy Electoral Commissioner, Mr Paul Dacey, told the Committee that the diversion of resources from those needed to administer the election process prior to and on polling day was a major concern.[67] The AEC's submission also noted that the Director of Public Prosecutions, the Australian

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62 *Committee Hansard*, pp. 41-3.

63 Submission no. 7, p. 1.

64 Submission no. 14, p. 2.

65 'Implementation of Truth in Political Advertising', submission no. 109, 14 November 1996 in AEC Submission no. 14, attachment 4, p. 5.

66 *Committee Hansard*, p. 37.

67 *Committee Hansard*, p. 43.

Federal Police, the Australian Government Solicitor and the courts would also experience pressure on their resources if such laws were enacted.[68]

5.67 Mr Becker did not comment or speculate on the funding and resource implications of the legislation on the South Australian Electoral Commission. He did, however, refer to the concern about the independence of the Commissioner. He noted that during his time as the South Australian Electoral Commissioner, he did not proceed on any matter without seeking the advice of the Crown Solicitor.[69] In order to avoid any perception of bias, the South Australian Electoral Commissioner also acted only on formal written complaints. If a similar federal law were enacted, the AEC had previously advised that it would apply the 'same cautionary measures', in that the advice of the Director of Public Prosecutions would be sought before action was taken.[70]

5.68 While believing that voters should exercise their own judgement about the appropriateness of any particular electoral campaign, the AEC saw some room for refinement of the electoral process by improving regulation of how to vote cards.[71] The AEC also proposed that if regulation of truth in electoral advertising were to proceed, the function should be undertaken by a separate body established for that purpose.[72] This suggestion is discussed in more detail below.

The AEC's proposal for an independent body

5.69 The AEC's submission referred to its previous proposal to the JSCEM in 1997 for the establishment of a separate body, an independent Electoral Complaints Authority (ECA), at each federal election for a specified time.

5.70 The AEC proposed that the ECA would be created under the Electoral Act with specified functions and powers, and would have a small staff, perhaps seconded from the AEC, the ABA or the Australian Federal Police.[73] The AEC envisaged that the ECA should have 'strong coercive' investigative powers as well as the power to seek injunctions, in order to allow it to act on complaints with 'the speed necessary to enable effective regulation in the relatively short time period of an election campaign'. The AEC referred to the Canadian models as an example of such a mechanism.[74]

5.71 The AEC's submission outlined the powers of the ABA to conduct investigations, hold hearings, examine documents and consult with individuals and groups in relation to broadcasting matters, and to publish a report on any matter.[75] The AEC suggested that, with similar powers, the ECA would be well suited to dealing with electoral complaints because:

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68 Submission no. 14, attachment 4, p. 5.

69 *Committee Hansard,* p. 41.

70 See AEC, submission no. 14, attachment 4, p.11.

71 *Committee Hansard*, pp. 37–40, and AEC submission no. 14A. The Committee notes that the issue of regulation of how to vote cards has been considered by the JSCEM (*The 1998 Federal Election*, pp. 37–42).

72 Andrew Becker, *Committee Hansard,* p. 37.

73 Submission no. 14, attachment 4, pp. 6–7. In Canada a complaints investigation office has been established within Elections Canada to investigate breaches of election law. It is staffed by lawyers, investigators and support staff.

74 Submission no. 14, attachment 4, pp.4– 6.

75 Submission no. 14, attachment 4, pp. 7–9.

- its strong investigative powers and capacity to seek injunctions would allow rapid resolution of complaints within the short time frame of the election period;
- the ECA would be separate from the AEC, avoiding any allegations of political bias by the AEC; and
- the ECA would be separately resourced so that there would be no competition for scarce AEC resources.[76]

5.72 The KCELJAG agreed with the proposition that an independent body should be set up to achieve the objectives of the Bill. However, as noted above, the KCELJAG recommended the establishment of separate committees to provide pre-clearance for electoral advertisements and receive complaints.[77]

5.73 The ABA's submission to this inquiry did not address the issue of whether a new body should be established, but argued that if a choice was to be made between the ABA and the AEC, the AEC was the appropriate body to oversee political advertising legislation. This view was based on the AEC's regulatory responsibilities and functions under the *Broadcasting Services Act 1992*, which the ABA argued were distinct in nature from those the Bill proposed. The Bill's provisions were concerned with the factual and legal content of electoral advertisements, rather than the regulation of licensees in broadcasting such advertisements.[78]

Conclusions and recommendations

5.74 The Committee considers it irrefutable that statements made to voters should, as far as possible, be accurate and not misleading, in order that voters can make informed decisions when casting their votes. Whether and how this should be subject to formal regulation rather than relying on the political process is, however, more controversial.

5.75 The history of consideration of this issue by the JSCEM over the last decade, as well as by the Queensland Legal, Constitutional and Administrative Review Committee, and the fact that concerns about electoral advertising continue to be raised show that careful and detailed consideration needs to be given to this issue.

5.76 The Committee considers there is clear evidence that the short-lived Commonwealth provision that sought to ensure 'truth' in political advertising in 1984 had serious flaws. However, the more limited provision that prohibits statements of fact that are inaccurate and misleading to a material extent has been in place for a considerable period in South Australia, seemingly without embroiling the Electoral Commissioner in that State in overwhelming controversy or undermining the perceived impartiality of that office. The Committee notes that the AEC, despite its opposition to the regulation of political advertising, would support the South Australian provisions in preference to the wider model. Those provisions are very similar to the current Bill.

5.77 The Committee is mindful of the evidence given by the former South Australian Electoral Commissioner, now the Australian Electoral Commissioner, that there have been two prosecutions under the South Australian Act; that the legislation in his opinion has not

76 Submission no. 14, attachment 4, p. 9.

77 Submission no. 22, p. 10.

78 Submission no. 20, pp. 1–2.

changed the political culture of that State to any great extent; but that in his view the legislation offers the opportunity for political parties to disrupt the electoral process.

5.78 The Committee has also considered the purpose of the Bill, namely to apply the same standards to political advertising as apply to commercial advertising under the Trade Practices Act. Clearly some parallels can be drawn between commercial advertising and political advertising, as the Queensland parliamentary committee explored in some detail in 1996. Not to be ignored is the contention that the proposal to regulate commercial advertising initially met with significant opposition on the grounds that the consumer was the final arbiter and that the marketplace was sufficiently self-regulatory.

5.79 However, some distinctions must be made between the trade practices model and proposals to regulate political advertising by legislation:

- There is an implied guarantee in the Constitution of freedom of discussion on political matters. While the South Australian Supreme Court's finding that the equivalent South Australian provisions are valid is highly persuasive, it must also be remembered that the High Court has not had the opportunity to finally determine this matter.
- Political advertising is different from commercial advertising in that it is only one of a wide range of strategies by which political parties seek to persuade voters to support them. Speeches, rallies, talkback radio, the promotion of party membership, newspaper and journal articles are only some of the means by which political parties seek to convey their message to the public. It is somewhat artificial to seek only to regulate political advertising in an election period while leaving untouched the other means of communication which may have equally significant effects on voters and which no-one has suggested could or should be subject to similar constraints. By contrast, sellers of products and services rely almost exclusively on advertising for that purpose, so that regulation of commercial advertising can significantly affect the conduct of corporations.
- Regulation of misleading advertising under the Trade Practices Act is by way of civil remedies only, such as damages and injunctions, whereas criminal offences are proposed to regulate political advertising.
- The timeframe in which action may be taken to remedy misleading corporate advertising is usually much longer than an election period, when remedial action must be available very quickly in order to make the laws effective.

5.80 The Committee notes that a subsequent Queensland parliamentary committee has referred to difficulties in drafting suitable and practical provisions to achieve truth in electoral advertising, and that no such legislation has been enacted in that State.

5.81 The Committee notes concerns expressed by the AEC about its proposed role under such legislation, particularly in relation to its perceived neutrality and the pressure on its resources. However, the Committee also notes that the JSCEM concluded in 1997 that the South Australian experience suggested that the AEC's concerns were 'overstated', and that it had never been suggested that the South Australian Electoral Office was incapable of carrying out its statutory responsibilities or had been compromised in doing so.[79] Nor does the Committee consider that the AEC's concerns about pressure on its scarce resources

79 JSCEM, *The 1996 Federal Election: Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, June 1997, para 7.18.

during an election period are in themselves sufficient argument against the introduction of such legislation: additional resources can be made available if necessary.

5.82 However, on balance the Committee does not consider that legislation in the form of the current Bill should be enacted because of its concerns about the practical implications of such legislation. In particular the Committee is concerned about the difficulties in ensuring a prompt response to complaints and preventing misuse of the legislation to score political advantage. The Committee is also uncertain about the extent to which it is appropriate to seek to regulate political discussion.

5.83 Nonetheless, it believes that some mechanism should be in place to address concerns about improper practices during election campaigns. The Committee considers that the JSCEM could take a more active role in scrutinising this particular aspect of the election phase. While no penalty as such would result from this process, the resultant public exposure of impropriety in the JSCEM's report may have the effect of changing undesirable practices.

Recommendation No. 4

5.84 The Committee recommends that the Electoral Amendment (Political Honesty) Bill 2000 [2002] not proceed because in its current form it does not present an effective or workable solution to prevent dishonest electoral advertising.

Other issues

5.85 If the Bill were to proceed or to be reintroduced in an amended form, amendment of various aspects should be considered. These are:

- the definition of material to be prohibited under the Bill;
- the reversal of the onus of proof;
- the appropriateness of the penalties;
- orders to publishers;
- headings to electoral advertisements; and
- other matters.

5.86 They are discussed below.

The definition of material to be prohibited under the Bill

5.87 Some submissions to the inquiry commented on the type of the material that the Bill sought to prohibit, that is, an electoral advertisement purporting to be a statement of fact that is inaccurate or misleading to a material extent.

5.88 There was clear support for the 'practical approach' taken by the South Australian Act which was confined to statements of fact, in preference to the former Commonwealth provision which dealt with 'untruths'.[80] However, Dr Carney criticised the definition in the Bill on the basis that it was broader than that applying under either the previous Commonwealth provision or the South Australian Act. Those provisions required that a statement should be both inaccurate (or untrue, in the case of the former Commonwealth

80 Mr Andrew Becker, *Committee Hansard*, p. 37; see also previous reports of the JSCEM.

provision) *and* misleading or deceptive to a material extent, whereas the current Bill requires only that the material is either inaccurate *or* misleading to a material extent. Dr Carney noted that the Bill might, as a result of this broader definition, capture quite innocuous advertising which was wrong in some minor respect.[81] There was no explanation as to why this form of words had been chosen.

Committee view

5.89 The Committee considers that Dr Carney's suggestion that the inclusion of the words 'inaccurate or misleading' may lead to minor inaccuracies being caught is a valid criticism. In the absence of any compelling argument to the contrary, the Committee suggests that the South Australian definition of 'inaccurate *and* misleading' may be more appropriate.

Reversal of the onus of proof

5.90 The Senate Standing Committee for the Scrutiny of Bills in its review of the Bill drew attention to the proposed defence to the new offence. The committee observed that the onus of proving the defence would be imposed on the person charged with the offence, and queried whether the reversal of the onus of proof trespassed unduly on personal rights and liberties.[82]

5.91 In his response, Senator Murray noted that the onus of proof is already reversed in the Commonwealth Electoral Act in relation to the offence of misleading a voter in the act of voting (section 329(1) discussed above at paragraph 5.8). However, he advised that he would have the Bill amended to ensure that the prosecution bears the onus of proof.[83]

Committee view

5.92 The Committee notes that one of the fundamental tenets of criminal law is that the prosecution is required to prove all the elements of the offence beyond reasonable doubt, and that this generally includes negativing evidence that would support a defence.

5.93 However, provisions that require a defendant to prove a defence are not unknown where their use is considered justified. The Bill as drafted does not rule out any of the common law defences that would normally apply, but merely provides an additional defence which the defendant must prove.[84] The South Australian electoral advertising offence provision similarly places the onus of proof on the defendant. As Senator Murray noted, section 329(1) of the Electoral Act already contains a similar defence in relation to misleading a voter in relation to casting his or her vote. In addition, the Committee notes that the Trade Practices Act, on which much of the reasoning for these provisions is based, provides a defence to proceedings for misleading and deceptive advertising in which the onus is similarly cast on the defendant (even though it must be remembered that those proceedings

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81 Submission no. 11, pp. 1–2.

82 *Alert Digest No. 15 of 2000*, quoted in the Senate Standing Committee for the Scrutiny of Bills *Seventeenth Report of 2000*, p. 528.

83 Senate Standing Committee for the Scrutiny of Bills *Seventeenth Report of 2000*, p. 529.

84 In *Cameron v Becker* (1994) 64 SASR 238, the court noted that the similar South Australian provision did not preclude the common law defence of honest and reasonable mistake of fact.

are civil rather than criminal).[85] The Committee notes also that the submission from the Attorney-General's Department did not comment on the provision as drafted.

5.94 The Committee does not consider that the provision is unduly onerous. Reversing the onus of proof in the current provision would effectively require the prosecution to prove that a person who caused, permitted, authorised or carried out the printing, publication or distribution of the electoral advertisement did not take part in determining its contents and could reasonably be expected to have known that the material was inaccurate or misleading. This change would significantly narrow the ambit of the proposed offence.

5.95 For these reasons, the Committee does not consider that the onus of proof of the defence in the provision as drafted would need to be changed if the Bill were to proceed.

Appropriateness of penalties

5.96 The Bill proposes significantly increasing the penalties for the existing offence in section 329 of the Electoral Act. The penalties would rise from $1,000 to $5,000 for a natural person, and from $5,000 to $50,000 for a body corporate. The proposed new offence for misleading or deceptive electoral advertising would also attract the same penalties.[86] The Committee notes that no explanation for these penalties was offered.

5.97 It is important to ensure that penalties for an offence are proportionate to the seriousness of the offence and provide a sufficient deterrent to the proscribed conduct. This point was underlined by the Australian Electoral Commissioner in his evidence to the Committee. In South Australia, the applicable penalties for misleading political advertising are $1,250 for individuals and $10,000 for corporations. In Mr Becker's view, the penalty did not provide a significant deterrent: he advised that the person prosecuted in 1993 under the Act had told him 'that he had got his 600 bucks worth', that being the fine imposed.[87]

5.98 However, a submission from the Attorney–General's Department expressed some concerns about the proposed penalties in the Bill:

- The penalty should be in proportion to the degree of intention or culpability that must be proven, and should reflect the relative seriousness of offence, both in the context of the Act and in comparison with other Commonwealth legislation. The Department did not elaborate on this point in terms of offering a comment on whether the proposed penalties were too high.
- However, the Department did submit that there should not be a separate penalty for a body corporate, as the *Crimes Act 1914* contained a general provision that the maximum penalty for the commission of an offence by an individual is multiplied by five for a body corporate. The Department noted that the Scrutiny of Bills Committee had emphasised the need for consistency in Commonwealth penalty provisions.
- The Department also noted that fines were generally expressed in terms of penalty units rather than dollar amounts.[88]

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85 *Trade Practices Act 1974,*section 85(3). The defendant must prove that he or she is in the business of publishing advertisements and had no reason to suspect that the publication would contravene the Act.

86 Submission no. 17, p. 2.

87 *Committee Hansard*, p. 44.

88 Submission no. 17, pp. 2–3, referring to s. 4(B)(3).

Committee view

5.99 The Committee agrees with the Attorney-General's Department that the larger penalty for corporations should be in keeping with the general rule set out in the *Crimes Act 1914*, that is, five times the penalty for an individual, and that the penalties should be expressed in penalty units.

5.100 The Committee notes that the penalties under the South Australian legislation are higher than the existing penalties under section 329(1) but less than those proposed in the Bill, being $1250 for individuals and $10,000 for corporations. The Committee also notes that the JSCEM in 1997 recommended that the AEC in consultation with the Attorney-General's Department should review the penalties under the Electoral Act and the Referendum Act because they were low.[89] The Committee notes also that the Government in 2001 stated that the review should be finalised as soon as possible on the basis that adequate penalties would help to deter potential offenders.[90]

5.101 The Committee considers that the current penalties may well need to be increased and that the outcome of the current review should be closely considered if this Bill is to proceed.

Orders to publishers

5.102 The Australian Press Council raised concerns over provisions 329(5A) and 329(5B) that give the Electoral Commissioner power to request, and the Federal Court the power to order, an advertiser to publish a retraction in a specified manner and form.

5.103 The Council argued that the provisions:

> … might have the unfortunate consequence of directing the publisher of a newspaper or magazine, or the licence holder of a broadcaster, to publish or broadcast material as ordered by the commission or the court, not as agreed to by the parties. The section should be amended to ensure that the advertiser, and the advertiser alone, is responsible to the commission or the court as the result of an inaccuracy or misleading statement.[91]

Committee view

5.104 The Committee notes that the provision allows a court to direct an 'advertiser' to publish a retraction in a specified manner and form and that this term is not defined either in the Act or in the Bill. The Committee recommends that the term should be defined if the Bill proceeds, in order to avoid any confusion as to its scope.

Headings to electoral advertisements

5.105 Proposed section 329A provides that electoral matter for which payment has been given and which appears in a newspaper is to have a heading of a specified size stating

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89 JSCEM, *The 1996 Federal Election: Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, June 1997, p. 90, Recommendation 51.

90 *Government Response to the Joint Standing Committee on Electoral Matters (JSCEM) Report 'The 1998 Federal Election',* p. 28.

91 Submission no. 23, p. 1.

'advertisement'. This provision appears to be drawn from the South Australian legislation.[92] 'Electoral matter' is already defined in the Act as meaning matter which is intended or likely to affect voting in an election.[93]

5.106 A submission from Mr E. J. Lockett supported the provision in principle but expressed concern that the definition of matter covered by the section might create loopholes. He did not consider that payment or the giving of other consideration was an appropriate restriction, arguing that the line between comment and advertising is becoming increasingly blurred, as exemplified by 'advertorials' or the granting of free advertisements to those who have previously advertised.[94]

Committee view

5.107 The Committee notes that there is already a similar provision in the Electoral Act (section 331) which provides that there must be headings to electoral advertisements in journals (that is, newspapers, magazines and other periodicals). Section 331(1) refers to a paragraph or article containing electoral matter, whether or not the article was inserted for payment. The penalty for an offence against the section is 5 penalty units (currently $550). Subsection 331(2) provides that where the article or paragraph spreads across two opposing pages and is either contained within lines or borders or is printed across the pages, the heading 'advertisement' must be printed.

5.108 Consequently, in the absence of any explanation as to why the existing section of the current legislation is deficient or what proposed section 329A of the Bill would achieve, the Committee does not consider that the amendment should proceed as drafted.

Other matters

5.109 The Committee also notes what appears to be an error in the drafting of proposed subsection 329(5A). Paragraph (b) of that subsection refers to an offence against subsection (2), which does not exist: it appears that the reference should have been to the new offence in subsection (1A). This error should be corrected if the Bill is to proceed.

Recommendation No. 5

5.110 The Committee recommends that if the Electoral Amendment (Political Honesty) Bill 2000 [2002] were to proceed, the following matters should be addressed:

- **amendment of proposed subsection 329(1A) to refer to a statement of fact that is 'inaccurate *and* misleading to a material extent' rather than 'inaccurate *or* misleading to a material extent';**
- **further consideration of the proposed penalties in light of the current review of penalties in the *Commonwealth Electoral Act 1918*, with particular reference to the general rule that maximum penalties for corporations are five times the maximum penalties for individuals and that statutory penalties are usually expressed in terms of penalty units;**

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92 *Electoral Act 1985* (SA), s. 114.

93 *Commonwealth Electoral Act 1918*, s.4.

94 Submission no. 12, p. [2].

- **definition of the term 'advertiser' in proposed subsections 329(5A) and 329(5B);**
- **deletion of proposed section 329A concerning the heading to electoral advertisements, unless further explanation is offered about its purpose and its relationship with existing section 331; and**
- **amendment of the error in proposed subsection 329(5A)(b) to refer to an offence against subsection (1A).**